LIBRARY
SUPREME COURT, U.S.

Office-Supreme Court, U.S.
FILED
FEB 21 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1051

DORCHESTER GAS PRODUCING COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BERNARD A. FOSTER, JR.
DONALD B. ROBERTSON
Ross, Marsh & Foster
725-15th Street, N. W.
Washington, D. C. 20005
Attorneys for
Dorchester Gas Producing
Company

February 21, 1966

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
Table of Citations	i
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	3
Statute Involved	3
Statement	3
Reasons For Granting Writ	8
1. The Decisions Below Conflict in Principle With Prior Decisions of This Court	8
2. The Decisions Below Present a Question of Major Importance in the Administration of the Natural Gas Act	18
Conclusion	20
Appendices	
A—Constitutional and Statutory Provisions Involved	1a
B—Opinions, Decrees, and Orders Below	8a
C—Excerpts From Permian Basin Area Rate Decision	16a

TABLE OF CITATIONS

CASES:

Arkansas Natural Gas Co. v. Arkansas R.R. Comm'n, 261 U.S. 379 (1923)	10
Banton v. Belt Line Ry. Corp., 268 U.S. 413 (1925)	17
Cities Service Gas Co. v. FPC, 255 F. 2d 860 (10th Cir. 1958), *cert. denied*, 358 U.S. 837 (1958)	17
Columbia Broadcasting System v. United States, 316 U.S. 407 (1942)	17
Deering Milliken, Inc. v. Johnston, 295 F. 2d 856 (4th Cir. 1961)	17

Page

Elmo Div. of Drive-X Co. v. Dixon, 348 F. 2d 342 (D.C. Cir. 1965) 17
FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) 16
FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956) 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19
Grace Line, Inc. v. FMB, 263 F. 2d 709 (2d Cir. 1959) .. 12
Hillsborough Tp. v. Cromwell, 326 U.S. 620 (1946) 17
Hope Natural Gas Co. v. FPC, 196 F. 2d 803 (4th Cir. 1952) 16
Isbrandtsen Co. v. United States, 211 F. 2d 51 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 990 (1954) 17
Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290 (1923) 17
Phillips Petroleum Co. v. FPC, 227 F. 2d 470 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956) 17
Prendergast v. N.Y. Tel. Co., 262 U.S. 43 (1923) 17
Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80 (1943) 12
Shell Oil Co. v. FPC, 334 F. 2d 1002 (3d Cir. 1965) ... 16
Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926) 17
Sun Oil Co. v. FPC, 266 F. 2d 222 (5th Cir. 1959) 17
Sunshine Pub. Co. v. Summerfield, 184 F. Supp. 167 (D.D.C. 1960) 17
United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956) 3, 4, 6, 8, 10, 11, 12, 14, 16, 17, 18, 19
Wisconsin v. FPC, 373 U.S. 294 (1963) 18

FEDERAL POWER COMMISSION OPINIONS AND ORDERS:

Area Rate Proceeding, AR61-1, Opinion No. 468, 34 F.P.C. .. (August 5, 1965), *appeal pending* (10th Cir. Nos. 8395, 8409, 8493, and 8495) 15, 16, 19
Area Rate Proceeding, AR61-1, 25 F.P.C. 614 (1961) .. 14
Area Rate Proceeding, AR61-1, 26 F.P.C. 247 (1961) .. 14
Area Rate Proceeding, AR61-1, 27 F.P.C. 943 (1962) .. 14
Area Rate Proceeding, AR61-1, 29 F.P.C. 408 (1963) .. 14
Area Rate Proceeding, AR61-2, 29 F.P.C. 981 (1963) .. 14

Page

Area Rate Proceeding, AR64-1, 31 F.P.C. 197 (1964) .. 14

H. J. Mosser, Federal Power Commission Docket No. RI65-292, order issued November 27, 1964 18

CONSTITUTION AND STATUTES:

Constitution of the United States

Generally 18

Amendment V 17

Federal Power Act, 49 Stat. 838 (1935), as amended, 16 U.S.C. §§ 792-828c (1958)

Generally 9

Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717-717w (1958)

Generally 3, 8, 9, 10, 18

Section 4 ..... 3, 8

Section 4(d) 16

Section 4(e) 16

Section 5 .....3, 15

Section 5(a) 5, 9, 12, 13, 16, 18

Section 14(a) 3, 9

Section 19 3

Section 19(b) 2, 3, 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No.

DORCHESTER GAS PRODUCING COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review two judgments of the United States Court of Appeals for the Third Circuit, the first entered in No. 15,295 on January 17, 1966, and the second entered in No. 15,518 on January 19, 1966, both cases entitled as above.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals in No. 15,295, printed in Appendix B hereto, *infra,* pp. 8a-9a, is reported at 353 F. 2d 162. The order of the Federal Power Commission (R. 934-36) under review in No.

15,295, printed in the Joint Appendix below, pp. 39a-43a, is reported at 32 F.P.C. 1339. The Commission's order denying rehearing (R. 960-62), printed in the Joint Appendix below, pp. 65a-68a, is reported at 33 F.P.C. 88.

The order of the Court of Appeals in No. 15,518, printed in Appendix B hereto, *infra*, pp. 10a-11a, is not yet reported. The Commission's order involved in No. 15,518, printed in Appendix B hereto, *infra*, pp. 12a-14a,* is not yet reported. The Commission's order denying rehearing, printed in Appendix B hereto, *infra*, p. 15a, is not yet reported.

JURISDICTION

The opinion of the Court of Appeals in No. 15,295 was filed on November 23, 1965 (*infra*, p. 8a). The decree of the Court of Appeals in No. 15,295 was entered on January 17, 1966 (*infra*, p. 10a). The order of the Court of Appeals in No. 15,518 was entered on January 19, 1966 (*infra*, p. 11a). Jurisdiction of this Court over both judgments is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. § 717r(b) (1958).

---

* It was stipulated below that the certification of the Commission record need not be filed in No. 15,518 until after disposition of the motion to dismiss filed therein. See "Stipulation" approved by the court below on November 15, 1965, in the record certified to this Court. The parties entered into this stipulation as a matter of convenience only and on the agreement that the relevant portions of the record either had already been printed in the Joint Appendix ["J.A."] or elsewhere in No. 15,295 or could be attached as appendices to any pleadings filed in respect of the motion to dismiss and, as so presented, could be relied upon as fully as if the record had been certified.

QUESTIONS PRESENTED

1. Whether the Federal Power Commission may deny a company regulated under the Natural Gas Act an opportunity to prove that the public interest requires an immediate increase in one of its jurisdictional contract rates because the rate is so low as to impair the financial ability of the company to continue its jurisdictional service, cast upon other consumers an excessive burden, and be unduly discriminatory—thus barring an avenue of relief under the Act as construed by this Court in *Mobile*[1] and *Sierra*?[2]

2. Whether under Section 19(b) of the Natural Gas Act a petition to review may be dismissed as premature where it seeks review of a Commission order which denies an immediate increase in rate and thereby causes immediate losses in revenue which can never be recouped?

STATUTE INVOLVED

The statutory provisions involved are Sections 4, 5, 14(a), and 19 of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717c, 717d, 717m(a), and 717r (1958). They are printed in Appendix A hereto, *infra*, pp. 1a-7a.

STATEMENT

On May 20, 1964, at Commission Docket No. RI64-749, petitioner filed a petition (R. 585-606) alleging, *inter alia*: that at least one of its jurisdictional rates, fixed by contract, was so low as to be unjust, unreason-

---

[1] United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956).

[2] FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956).

able, and confiscatory; that such rate was unduly discriminatory in relation to its other jurisdictional rates; that, if such low rate were not increased, the necessary result would be to impair its financial ability to continue its jurisdictional service, to cast upon other consumers an excessive burden, and to impose undue discrimination; and that, as a consequence, such rate adversely affects the public interest. (R. 589, 602).

In support, petitioner asserted that its financial position was precarious (R. 590-602), largely because of the above rate which is restricted by contract to the unreasonable and unjust level of 7.1463¢ per Mcf (R. 587-88); that the purchaser had declined to agree to an increase in that rate (*ibid.*); that the sale involved almost one-half of all of the volumes of gas sold by petitioner in 1963 (R. 591-92, 596); that petitioner's average jurisdictional revenues in 1963 were 12.3113¢ per Mcf, while its corresponding costs were 18.0¢ per Mcf (R. 596); and that it was able to continue operation of its jurisdictional properties solely because of the forebearance of the holders of its mortgage debt, petitioner being in arrears in its mortgage payments in the aggregate amounts, as of January 1, 1964, of $12,116,688.30 as to principal and $521,170.99 as to interest (R. 597).

On the basis of the foregoing allegations and relying expressly on *Mobile*[3] and *Sierra*,[4] petitioner requested the Commission to institute forthwith a general investigation of all of its jurisdictional rates, thus affording petitioner an early opportunity to show the adverse effects on the public interest through evidence

[3] See *supra* n. 1.

[4] See *supra* n. 2.

demonstrating the accuracy of the foregoing allegations. As to any rate determined to be "so low as to adversely affect the public interest," petitioner requested the Commission to authorize an increase in rate (R. 603-05).

After a delay of six months, the Commission denied petitioner's request on November 19, 1964 (R. 934-36). It denied an application for rehearing on January 19, 1965.[5]

The November 19 order noted that petitioner's 7.1463-cent rate is "involved" in the *Hugoton-Anadarko* area proceeding,[6] and the order denying rehearing stated that (R. 961):

> "In the area proceeding Dorchester will receive full consideration of its claims to relief under Section 5(a)."

Petitioner timely sought review of the November 19 order.[7]

Meanwhile, in view of the statement that its claims would receive "full consideration" in the area proceeding, petitioner promptly filed in that proceeding another request for relief (J.A. 97a-104a). That application, filed on January 29, 1965, set forth the foregoing allegations and procedural background and sought (J.A. 102a):

> "* * * the right to adduce promptly an individual company cost of service so as to establish a record

---

[5] R. 960-62. The application for rehearing appears at R. 938-58.

[6] R. 936. The *Hugoton-Anadarko* proceeding is formally denominated Area Rate Proceeding, Commission Docket No. AR64-1.

[7] See Petition for Review (J.A. 69a-112a) filed on March 18, 1965, at Docket No. 15,295 in the United States Court of Appeals for the Third Circuit.

basis for issuance by the Commission of an order increasing the 7.1463-cent price under its Rate Schedule No. 2 to a level not less than Dorchester's proven unit cost of service, in the manner contemplated by the Supreme Court's announcements in *Sierra* and *Mobile.*"

Petitioner once again advised the Commission that its financial situation as to its jurisdictional operations was continuing to deteriorate and urged that action on its application be expedited (*ibid.*).

On March 9, 1965, the presiding examiner issued an order denying the application "in all respects" (J.A. 104a-05a). He stated—inaccurately—that petitioner's application was "substantially the same as" routine requests by other companies to introduce individual cost evidence, noting that all of these had been denied by the Commission (J.A. 105a).

Petitioner forthwith appealed to the Commission (J.A. 106a-12a). This was denied by an order issued on April 13, 1965 (*infra,* pp. 12a-14a) whereby the Commission made clear that it would not consider evidence of petitioner's cost of service. The Commission stated (*infra,* pp. 13a-14a):

> "Thus, *without here determining what showing would be essential to 'the protection of the public interest,* as distinguished from the private interests' of Dorchester or other producers in context of an area rate proceeding it is clear that introduction of an individual company cost of service by Dorchester would not be of any greater relevance to a determination of the *Sierra* issue than to the fixing of the area rate itself.
>
> "To the extent that Dorchester is claiming that it is legally or equitably entitled to special relief over and beyond that to be afforded all other respondents who may have contractual inhibitions on filing rates up to the levels specified in our area

rate determination, *it is sufficient to add that Dorchester must await the fixing of the area rate or rates before it can properly present such a claim.* This does not mean that having deferred Dorchester's claim (in Docket No. RI64-497) [sic] for an immediate proceeding to secure relief under the *Sierra* case in our order of January 19, 1965, for consideration as part of this proceeding, we are now postponing any possibility of relief for still an additional period of time. As indicated, Dorchester will be able to make any relevant showing indicating that as part of our area price determination there are public interest reasons why producers should be permitted to file increases up to the general area rate or at least up to some specified level, their contracts notwithstanding, and we would, in any event, not be in a position to determine whether Dorchester was entitled to some special exception to the area rate until it had been fixed." (Emphasis supplied)

Petitioner's application for rehearing was summarily denied on June 7, 1965 (*infra,* p. 15a). Petitioner timely sought review of the April 13 order.[8]

Thereafter, the court below in No. 15,295 affirmed the Commission's order of November 19, 1964, denying petitioner's request for an individual hearing and investigation of its rates (*infra,* pp. 8a-9a). In so doing, the court held that the sole issue before it was "whether there was substantial *evidence* before the Commission to support its findings and order" (*ibid.;* emphasis supplied).

Later, on January 19, 1966, the court below dismissed the petition for review in No. 15,518 as "premature" (*infra,* pp. 10a-11a).

---

[8] See Petition for Review filed on August 6, 1965 at Docket No. 15,518 in the United States Court of Appeals for the Third Circuit.

REASONS FOR GRANTING THE WRIT

The decisions below conflict in principle with prior decisions of this Court and involve questions of major importance in the administration of the Natural Gas Act.

1. The Decisions Below Conflict in Principle With Prior Decisions of This Court

The decisions of the court below conflict irreconcilably with principles announced by this Court in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956), and *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956), in that they approve Commission orders which deny to regulated companies suffering confiscation an "avenue of relief" when their interests coincide with the public interest.

In *Mobile*, this Court held that Section 4 of the Act[9] does not authorize a natural gas company to file for an increase in rate unless there is a contractual provision authorizing such increase. In thus barring a unilateral filing for a rate increase, the Court recognized that there are situations in which the public interest would nevertheless require that a contractually restricted low rate be increased, interpreting the Act to make the following provision therefor (350 U.S. at 344-45):

> "It may be noted also that *this interpretation*, while precluding natural gas companies from unilaterally changing their contracts simply because it is in their private interests to do so, *does not deprive them of an avenue of relief when their*

[9] 52 Stat. 822 (1938), as amended, 76 Stat. 72 (1962), 15 U.S.C. § 717c (1958).

> *interests coincide with the public interest.* Section 5(a) authorizes the Commission to investigate rates not only 'upon complaint of any State, municipality, State commission, or gas distributing company' but also 'upon its own motion'. Thus, while natural gas companies are understandably not given the same explicit standing to complain of their own contracts as are those who represent the public interest or those who might be discriminated against, there is nothing to prevent them from furnishing to the Commission any relevant information and requesting it to initiate an investigation on its own motion.[4] *And if the Commission, after hearing, determines the contract rate to be so low as to conflict with the public interest, it may under § 5(a) authorize the natural gas company to file a schedule increasing the rate.*" (Emphasis supplied)

"[4] See § 14(a) of the Act, providing in part: 'The Commission may permit any person to file with it a statement in writing * * * as to any or all facts and circumstances concerning a matter which may be the subject of investigation.' 52 Stat. 828, 15 U.S.C. § 717m, 15 U.S.C.A. § 717m."

The rate provisions of the Act were thus construed by this Court to provide an "avenue of relief" to a natural gas company with a low rate which adversely affects the public interest.

In *Sierra,* this Court further defined this "avenue of relief." Noting that the relevant provisions of the Federal Power Act[10] "are in all material respects substantially identical to the equivalent provisions of the Natural Gas Act" (350 U.S. at 353), the Court prescribed the considerations which should govern the

[10] 49 Stat. 838 (1935), as amended, 16 U.S.C. § 792-828c (1958).

Commission when faced with a contractually restricted low contract rate (350 U.S. at 354-55):

> "In short, the Commission holds that the contract rate is unreasonable solely because it yields less than a fair return on the net invested capital. But, while it may be that the Commission may not normally *impose* upon a public utility a rate which would produce less than a fair return, it does not follow that the public utility may not itself agree by contract to a rate affording less than a fair return or that, if it does so, it is entitled to be relieved of its improvident bargain. Cf. Arkansas Natural Gas Co. v. Arkansas Railroad Comm., 261 U.S. 379, 43 S. Ct. 387, 67 L. Ed. 705. *In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory.*" (Second emphasis supplied)

We read *Mobile* and *Sierra,* therefore, as standing for the proposition that an "avenue of relief" is available to a regulated company with a contractually restricted rate so low that it conflicts with the public interest but that, in such a situation, the Commission's "sole concern" must be the public interest. And the Commission's primary duty under the Natural Gas Act is the protection of the public interest. The decisions below are in direct conflict with these principles and would bar the very "avenue of relief" which this Court held to be open.

Petitioner, by its request for an investigation pursuant to the procedure outlined in *Mobile,* asserted and sought the opportunity to prove that it has at least one rate which "is so low as to adversely affect

the public interest" in that, as contemplated in *Sierra*, such rate (R. 589):

> "* * * is 'unduly discriminatory' in relation to the regulated rates covering other jurisdictional sales by Dorchester; and that if such rate is not increased, the necessary result will be either to 'impair the financial ability' of Dorchester to continue its jurisdictional service, or to 'cast upon other consumers an excessive burden.'"

At the very least, therefore, the Commission should have informed itself sufficiently as to the nature of petitioner's contentions to permit a finding whether the public interest required further action. But the Commission's summary denial of petitioner's request does not even mention the public interest. Though petitioner had proceeded in exact accordance with *Mobile* and *Sierra*, the Commission failed to hold a hearing, failed to conduct an investigation, and failed even to make any findings which might reasonably be associated with the public interest. On the contrary, it stated expressly (R. 936):

> "We do not reach the question posed here by Dorchester as to whether or not Dorchester comes within the test laid down by the Court in *Sierra* for relief under Section 5(a) for the reasons set forth below."

The "reasons" stated by the Commission for its refusal to consider the public interest issue posed by petitioner were the following observations, none of which bears any causal relationship to the issue presented (*ibid.*):

> "Dorchester's two important sales (Rate Schedule Nos. 1 and 2) are thus involved in Docket No. AR64-1. Even if the Commission were to insti-

> tute a separate investigation under Section 5(a) into Dorchester's sale to Natural, Dorchester would not receive any relief until the Section 5(a) investigation was completed and a Commission order issued. Moreover, any action taken by the Commission under Section 5(a) in a separate investigation would be applicable only until such time as the Commission renders a decision in Docket No. AR64-1."

These recitals do not deal with the issue raised by petitioner—what the public interest requires *now*. Significantly, the Commission's order said nothing of the substantial time span between an order resulting from an individual Section 5(a) investigation and a decision in the area proceeding at Docket No. AR64-1. Nor did the Commission say anything with respect to the public interest—the consideration which *Sierra* prescribes as the Commission's "sole concern." 350 U.S. at 355.

Since none of the "reasons" stated by the Commission for its action had a causal relationship with the issue presented they provide no support for the order, and the order itself must fall. *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943), and *Grace Line, Inc. v. FMB*, 263 F. 2d 709, 711 (2d Cir. 1959). As the Court held in *Chenery* (318 U.S. at 87):

> "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."

The Commission's denial of petitioner's request for an investigation was not merely an academic or technical action. On the contrary, it foreclosed the very relief contemplated in *Mobile* and *Sierra*, for its effect was to relegate petitioner to one of the Commis-

sion's experimental area rate proceedings. Indeed, in its order denying rehearing, the Commission stated (R. 961):

> "In the area proceeding Dorchester will receive full consideration of its claims to relief under Section 5(a)."

This merely held out a carrot, however, for individual cost-of-service evidence—an indispensable element in the proof of *petitioner's* "claims to relief under Section 5(a)"—had regularly been barred by the Commission from all area proceedings.

In *Sierra,* the Court held that a rate may be "so low as to adversely affect the public interest" if (350 U.S. at 355):

1. The rate might "impair the financial ability of the public utility to continue its service";
2. The rate might "cast upon other consumers an excessive burden"; or
3. The rate might "be unduly discriminatory."

Each of those examples of an adverse effect of a low rate upon the public interest has meaning only with respect to a single company. Each requires an individualized presentation and, in the historical regulatory context, clearly contemplates a determination based upon an individualized cost of service. In order to determine whether a company's financial ability to continue service is impaired by a low rate, it is essential that the low rate be weighed against the company's cost of rendering the service involved and, if there is a resulting deficiency in revenue, that such deficiency be measured against the company's ability to sustain

it. Similarly, to determine whether a low rate casts an excessive burden upon a company's other customers, or is unduly discriminatory, it is essential that the low rate be measured against the cost of rendering the service for which the rate is received and, if there is a resulting deficiency, that it be determined whether that deficiency is being and should be recouped from the other customers.

These principles, we think, are beyond dispute. Accordingly, evidence of a company's cost of service is required to determine whether one of its rates is so low as to "adversely affect the public interest" in the manner set forth in *Sierra*. And petitioner's claims for relief alleged these very adverse effects on the public interest, claims which the Commission denied with an assurance that they would receive "full consideration" in the "area proceeding."

The Commission has consistently held that individualized cost-of-service presentations are inappropriate and barred from area proceedings.[11] Long before its assurance that petitioner's claims would receive full consideration in the area proceeding, this general principle had been applied in the very *Hugoton-Anadarko* area proceeding[12] to which petitioner's claims were relegated. And, by the second order here under review, this principle was applied specifically to petitioner (*infra*, pp. 12a-14a).

The incompatibility of the Commission's position here and the requirements of *Sierra* and *Mobile* is

---

[11] See, *e.g.*, Area Rate Proceeding, AR61-1, 25 F.P.C. 614 (1961), 26 F.P.C. 247 (1961), 27 F.P.C. 943 (1962), 29 F.P.C. 408 (1963); and Area Rate Proceeding, AR61-2, 29 F.P.C. 981 (1963).

[12] Area Rate Proceeding, AR64-1, 31 F.P.C. 197, 198 (1964).

graphically displayed by the emphasized portion of the following sentence appearing in the April 13 order (*infra*, p. 13a).

> "As we made clear therein, Dorchester is free, either on its own or in concert with producers similarly situated, to attempt to show in the present proceeding that the public interest would be served, *within the meaning of the Sierra doctrine and in context of an area price proceeding,* by Commission action pursuant to Section 5 of the Natural Gas Act, to make possible producer filings of rate increases up to the price determined to be just and reasonable for similar gas despite existing contractual inhibitions on such filings." (Emphasis supplied)

The crux of the Commission's response to petitioner's requests for relief is compressed into the emphasized phrase. The Commission says petitioner is free "to attempt to show" that the public interest would be served by allowing it to increase its low rate. How? The Commission carefully does not say. And we know of no way if the Commission bars a showing of individual costs, the sort of showing expressly contemplated by *Sierra*.

This is not to say that the Commission cannot attempt in an area proceeding to authorize increases in low contract rates, wholly without regard to costs or any of the tests enumerated in *Sierra*. Thus, in its recent *Permian Basin* decision,[13] the Commission arbitrarily fixed a 9¢ per Mcf *minimum* price, but this level did not purport to be geared to individual costs

---

[13] Area Rate Proceeding, AR61-1, Opinion No. 468, 34 F.P.C. ... (August 5, 1965), *appeal pending,* Skelly Oil Co. v. FPC (10th Cir. Nos. 8395, 8409, 8493, and 8495). The relevant portion of Opinion No. 468 is printed in Appendix C, *infra*, pp. 16a-18a.

or any other test (*infra*, pp. 16a-18a). On the contrary, 9¢ was simply the level to which the Commission determined that *any* low contract rate could be advanced—irrespective of whether 9¢ was less or more than the costs underlying the sale and whether or not a lesser rate impaired the ability of its recipient to continue service, or cast upon other consumers an excessive burden, or was unduly discriminatory.

This minimum-price edict of *Permian*—granted to all, needed or not—clearly has no relationship to the sort of public interest considerations contemplated by *Sierra* and *Mobile*. Accordingly, there is no prospect whatsoever that the Commission will consider the public interest claims advanced by petitioner in the area proceeding—or elsewhere—and it is these claims, refused individual consideration, which the Commission said would receive "full consideration" in the area proceeding.

Moreover, even if the ultimate decision in the area proceeding—in some arbitrary, generalized manner such as ordered in *Permian*—should permit petitioner to raise its low rate, the Commission would have no power to make that rate effective retroactively.[14] Thus, by refusing to give timely consideration to the public interest issue raised by petitioner, the Commission has finally and irrevocably denied petitioner any relief from its confiscatory rate for an indeterminable period pending an area order, even though the public interest, if considered now, might compel immediate relief, as petitioner alleges. Since there can be no retroactive

---

[14] Natural Gas Act, §§ 4(d)(e), 5(a), 15 U.S.C. §§ 717c(d)(e), 717d(a); FPC v. Hope Natural Gas Co., 320 U.S. 591, 618 (1944); Shell Oil Co. v. FPC, 334 F.2d 1002, 1008-09 (3d Cir. 1965); and Hope Natural Gas Co. v. FPC, 196 F.2d 803, 805-08 (4th Cir. 1952).

relief—even in aid of the public interest—it is clear that judicial review of the April 13 order will be meaningless and ineffective if delayed until a final decision, some years hence, in the area proceeding.[15]

The Court below, by summarily affirming the Commission in No. 15,295, and dismissing the appeal in No. 15,518, has approved the closing of the "avenue of relief" charted in *Mobile* and *Sierra*. Those decisions

---

[15] The decision below in No. 15,518 conflicts in principle with decisions of this Court and other circuits regarding the reviewability of orders of administrative agencies. As a final determination of petitioner's right to an immediate rate increase, the April 13 order was reviewable under § 19(b) of the Act. See, *e.g.*, Columbia Broadcasting System v. United States, 316 U.S. 407, 425 (1942); Sun Oil Co. v. FPC, 266 F.2d 222, 226 (5th Cir. 1959); Cities Service Gas Co. v. FPC, 255 F.2d 860, 863 (10th Cir. 1958), *cert. denied*, 358 U.S. 837 (1958); Phillips Petroleum Co. v. FPC, 227 F.2d 470, 474 (10th Cir. 1955), *cert. denied*, 350 U.S. 1005 (1956); and Isbrandtsen Co. v. United States, 211 F.2d 51, 55-56 (D.C. Cir. 1954), *cert. denied*, 347 U.S. 990 (1954).

Further pursuit of an administrative remedy is not required where the very existence of such a remedy is in doubt. Hillsborough Tp. v. Cromwell, 326 U.S. 620, 625-26 (1946). So also where there is no administrative remedy from the action complained of, or where the delay involved in further administrative action would result in the denial of the very relief sought. See, *e.g.*, Elmo Div. of Drive-X Co. v. Dixon, 348 F.2d 342 (D.C. Cir. 1965); Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961); and Sunshine Pub. Co. v. Summerfield, 184 F.Supp. 167 (D.D.C. 1960). It is a deprivation of due process of law under the Fifth Amendment to the Constitution to require one claiming confiscation to exhaust administrative remedies, prior to seeking judicial relief, if the remedies yet to be exhausted would not afford compensation for losses incurred during an unreasonable period of delay pending administrative action. See, *e.g.*, Smith v. Illinois Bell Tel. Co., 270 U.S. 587 (1926); Banton v. Belt Line Ry. Corp., 268 U.S. 413 (1925); Prendergast v. N.Y. Tel. Co., 262 U.S. 43 (1923); and Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290 (1923).

are thus in direct conflict with the applicable decisions of this Court.[16]

2. The Decisions Below Present a Question of Major Importance in the Administration of the Natural Gas Act

The question involved in these cases—whether there shall continue to exist the "avenue of relief" this Court in *Mobile* and *Sierra* construed to be available under the Natural Gas Act—is vitally important in the administration of that Act.

In 1956, the Court determined in *Sierra* and *Mobile* that the public interest can require an increase in a contractually restricted low rate. The public interest considerations there recognized have not changed. The applicable provisions of the Act remain the same. Unilateral rate increases remain barred. Thus, the problem contemplated in *Mobile* and *Sierra* is a continuing one.

Indeed, the relief contemplated by *Mobile* and *Sierra* may be even more important now than in 1956. The Commission has now shifted to an area approach to the regulation of the rates of natural gas producers.[17]

---

[16] The Commission's refusal to hold an investigation and hearing under § 5(a) of the Act and to permit petitioner to introduce evidence of its cost of service was discriminatory, thereby depriving petitioner of its rights under the Constitution of the United States and the Act. The Commission's action failed to accord the same treatment to the instant case as it has to other cases presenting a public-interest question with respect to rate level. On a number of occasions since turning to an area approach, the Commission has ordered prompt, *individualized* hearings in situations where it deemed the public interest to be adversely affected by a rate considered too high. See, *e.g.*, H. J. Mosser, Commission Docket No. RI65-292, in which an order issued—eight days *after* denial of petitioner's request for an investigation—consolidating three individual rate dockets and setting them for "an immediate hearing."

[17] See Wisconsin v. FPC, 373 U.S. 294 (1963).

As we have shown, it refuses to receive or consider individual costs in area proceedings.[18] As a consequence, absent *Sierra-Mobile* relief, producers with contractually restricted low rates would be forced to wait for years for a decision in an area proceeding, nurtured only by a hope that the Commission's "minimum-price" procedure may *accidentally* afford relief in their particular situation.

As the Commission has recognized, there are numerous producers with contractually restricted low rates.[19] Under *Mobile* such a producer is not permitted to file unilaterally for a rate increase and, *pendente lite,* collect a higher rate subject to refund. Accordingly, both he and the public interest may suffer irreparable injury as the result of losses in revenue which can never be recouped.[20] Moreover, if the "avenue of relief" delineated in *Mobile* and *Sierra* is to be destroyed, he will never be permitted to show how much the public interest requires that his contractually restricted low rate be increased in order to assure the continuity of his service, to equalize the burden on his customers, and to establish nondiscriminatory rates. The decisions below endorse abandonment of these public interest considerations.

In a very real sense, therefore, there is even a greater public need for the "avenue of relief" now than there was in 1956 when the Commission was attempting to regulate entirely on the basis of individual costs. If

---

[18] See *supra* nn. 11, 12.

[19] *Cf.* Area Rate Proceeding, AR61-1, Opinion No. 468 (mimeo. ed., pp. 114-16), *infra,* pp. 16a-18a, and the Commission's "Motion to Dismiss" (p. 3) in No. 15,518 in the court below.

[20] See *supra* n. 14.

the public interest required, and the Natural Gas Act provided, an "avenue of relief" to all natural gas companies in 1956, then *a fortiori* that avenue should remain open now.

This "avenue of relief" was declared available in aid of the public interest. The disposition of this case will decide whether that path shall hereafter remain open.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD A. FOSTER, JR.
DONALD B. ROBERTSON
Ross, Marsh & Foster
725-15th Street, N. W.
Washington, D. C. 20005
Attorneys for
Dorchester Gas Producing Company

Dated at Washington, D. C.
this 21st day of February, 1966

APPENDICES

APPENDIX A

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES

* * * * * * * * * *

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * * * * * * * * *

NATURAL GAS ACT

[Act of June 21, 1938, c. 556, 52 Stat. 821, as amended; 15 U.S.C. §§ 717-717w (1958)]

* * * * * * * * * *

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any

State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as

speedily as possible. [52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c]

FIXING RATE AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas. [52 Stat. 823 (1938); 15 U.S.C. § 717d]

* * * * * * * * * *

INVESTIGATIONS BY COMMISSION; ATTENDANCE OF WITNESSES; DEPOSITIONS

SEC. 14. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this act or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this act or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress. The Commission may permit any person to file with it a statement in writing, under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized by section 312 of the Federal Power Act, and make available to State commissions and municipalities, information concerning any such matter.

* * * * * * * * * *

REHEARING; COURT REVIEW OF ORDERS

SEC. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application

to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may

order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order. [52 Stat. 831 (1938); 15 U.S.C. § 717r]

* * * * * * * * * * *

APPENDIX B

Opinions, Decrees, and Orders Below

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15295

DORCHESTER GAS PRODUCING COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

On Petition for Review of an Order of the Federal Power Commission

Argued November 4, 1965

Before STALEY and FREEDMAN, *Circuit Judges,* and COHEN, *District Judge.*

OPINION OF THE COURT

(Filed November 23, 1965)

PER CURIAM

Petitioner, pursuant to Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), seeks to set aside an order of respondent, denying an individualized investigation of contract price rates for all of its jurisdictional sales flowing from the Hugoton-Anadarko supply area.

The Commission has pending a comprehensive investigation of all sales and all rates of natural gas utilities, including petitioner's, in the Hugoton-Anadarko area gas fields. In refusing petitioner an individualized investigation of its rates, it determined that comprehensive investigation was preferable to "piece-meal" inquiry. It concluded that under the Act its primary function was to promote the paramount interest of the consuming public by establishing rate stability in this producing area.

The sole issue raised is whether there was substantial evidence before the Commission to support its findings

and order. A careful examination of the record convinces us that the Commission acted properly and within a permissive area of administrative conduct wherein it reasonably exercised its discretion upon substantial and sufficient basis in fact and law. *Superior Oil Co. v. Federal Power Commission*, 322 F.2d 601 (9 Cir. 1963), cert. den. 377 U. S. 922 (1964), rehearing den. 377 U. S. 960 (1964); *Wisconsin v. Federal Power Commission*, 373 U. S. 294 (1963).

The order of the Federal Power Commission under review will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15,295

DORCHESTER GAS PRODUCING COMPANY, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent.

Present: STALEY and FREEDMAN, *Circuit Judges*, and COHEN, *District Judge*.

Decree

WHEREAS in a proceeding before the Federal Power Commission entitled Dorchester Gas Producing Company, Docket Nos. RI64-749, G-18671 and RI60-11, an order was issued November 19, 1964, and rehearing was denied by an order issued January 19, 1965, as appears by inspection of the record of the Federal Power Commission, and the order of November 19, 1964, was brought before the United States Court of Appeals for the Third Circuit for review by a petition filed herein by Dorchester Gas Producing

Company agreeably to the Act of Congress in such case made and provided;

And Whereas this cause came on to be heard before the said United States Court of Appeals for the Third Circuit, and the Opinion of the Court was filed herein on November 23, 1965;

On consideration whereof, it is this 17th day of January, 1966, ordered and adjudged by the Court that the aforesaid order of the Federal Power Commission dated November 19, 1964, be and the same hereby is affirmed.

By the Court,

Staley
Circuit Judge

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15518

Dorchester Gas Producing Company, *Petitioner*,

vs.

Federal Power Commission, *Respondent*.

Present: Kalodner, *Chief Judge*, and McLaughlin and Ganey, *Circuit Judges*.

Upon consideration of the motion by respondent to dismiss the petition for review in the above entitled case on the ground that it is apparent from the petition that petitioner seeks a premature review of an order in an area rate proceeding, and of the petitioner's answer that the order sought to be reviewed is a final disposition of petitioner's rights and a final refusal to consider the immediate requirements of the public interest, and of respondent's reply and petitioner's supplemental answer, and after full hearing, and the Court being of the opinion that the petition for review is premature,

It is ORDERED that the petition for review in the above entitled case be and it hereby is dismissed for want of jurisdiction.

By the Court,

KALODNER
Chief Judge

Dated: January 19, 1966

ORDERS OF THE FEDERAL POWER COMMISSION

"Order Denying Request for Investigation Under Section 5(a) of the Natural Gas Act," dated November 19, 1964, in *Dorchester Gas Producing Co.*, Docket No. RI64-749 (R. 934-36) is printed at pages 39a-43a of the Joint Appendix in No. 15,295 of which nine additional copies are filed herewith.

"Order Denying Motion for Reconsideration," dated January 19, 1965, in *Dorchester Gas Producing Co.*, Docket No. RI64-749 (R. 960-62) is printed at pages 65a-68a of the Joint Appendix in No. 15,295.

* * * * * * * * * *

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; L. J. O'Connor, Jr., Charles R. Ross and David S. Black.

Docket Nos. AR64-1, *et al.*

Area Rate Proceeding, *et al.* (Hugoton-Anadarko Area)

Order Denying Appeal

(Issued April 13, 1965)

Dorchester Gas Producing Company (Dorchester), on March 12, 1965, appealed a ruling of the presiding examiner which denied Dorchester permission to adduce herein individual company cost of service data for the purpose of showing that under the *Sierra* doctrine[1] it is entitled to a higher rate under its Rate Schedule No. 2 than is contractually authorized. Dorchester's request and the examiner's ruling were made in the pre-hearing stages of this proceeding. The examiner decided that the issues of elevation of fixed gas purchase contracts and the applicability of the *Sierra* doctrine should be resolved on an area basis and not on an individual company basis, citing the Commission's order issued January 19, 1965, in Docket No. RI64-749, which denied reconsideration of Dorchester's petition for a general rate investigation. The examiner also held that the relief sought here by Dorchester was substantially the same as that previously denied to other parties by the Commission in this same proceeding by order issued January 30, 1964, 31 FPC 197.

In its appeal Dorchester claims, among other things, that (1) the Commission's January 19, 1965, order did not purport to foreclose the presentation of its individual company data in the area proceeding; and (2) the relief sought by it is not substantially the same as that previously sought

---

[1] *F.P.C. v. Sierra Pacific Power Co.*, 350 U.S. 348.

by other parties and denied by order of the Commission issued January 30, 1964, inasmuch as it is seeking relief under the *Sierra* doctrine from alleged confiscation.

Dorchester's motion misconceives the holding of our order of January 19, 1965, in Docket No. RI64-749. As we made clear therein, Dorchester is free, either on its own or in concert with producers similarly situated, to attempt to show in the present proceeding that the public interest would be served, within the meaning of the *Sierra* doctrine and in context of an area price proceeding, by Commission action pursuant to Section 5 of the Natural Gas Act, to make possible producer filings of rate increases up to the price determined to be just and reasonable for similar gas despite existing contractual inhibitions on such filings. *Sierra* makes clear, however, that even in the context of individual company rate making for pipelines or public utilities the issue is not whether the contractual limitations on rate filings will result in affording the company less than a fair return, but whether the rate "is so low as to adversely affect the public interest" (350 U.S. 348 at 355). Thus, without here determining what showing would be essential to "the protection of the public interest, as distinguished from the private interests" of Dorchester or other producers in context of an area rate proceeding it is clear that introduction of an individual company cost of service by Dorchester would not be of any greater relevance to a determination of the *Sierra* issue than to the fixing of the area rate itself.

To the extent that Dorchester is claiming that it is legally or equitably entitled to special relief over and beyond that to be afforded all other respondents who may have contractual inhibitions on filing rates up to the levels specified in our area rate determination, it is sufficient to add that Dorchester must await the fixing of the area rate or rates before it can properly present such a claim. This does not mean that having deferred Dorchester's claim (in Docket

No. RI64-497) for an immediate proceeding to secure relief under the *Sierra* case in our order of January 19, 1965, for consideration as part of this proceeding, we are now postponing any possibility of relief for still an additional period of time. As indicated, Dorchester will be able to make any relevant showing indicating that as part of our area price determination there are public interest reasons why producers should be permitted to file increases up to the general area rate or at least up to some specified level, their contracts notwithstanding, and we would, in any event, not be in a position to determine whether Dorchester was entitled to some special exception to the area rate until it had been fixed.

The Commission orders:

For the reasons set forth above, Dorchester's appeal from the examiner's ruling of March 9, 1965, is denied.

By the Commission.

(SEAL)

Gordon M. Grant,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: David S. Black, Acting Chairman; L. J. O'Connor, Jr., Charles R. Ross, and Carl E. Bagge.

Docket Nos. AR64-1, *et al.*

AREA RATE PROCEEDING, *et al.*

Order Denying Motion for Reconsideration

(Issued June 7, 1965)

Dorchester Gas Producing Company (Dorchester) on May 13, 1965, tendered an application for rehearing of the Commission's order issued April 13, 1965, in the above-entitled proceedings denying its appeal from the examiner's refusal to permit Dorchester to present individual company cost of service evidence in the area rate proceeding.

An application for rehearing of an interlocutory order, such as involved here, may not properly be filed [Section 1.30(e) of the Rules of Practice and Procedure (18 CFR 1.30(e))]. We have decided to treat Dorchester's document as a motion for reconsideration.

Dorchester's motion for reconsideration presents no new facts or principles of law which were not fully considered by the Commission in the April 13 order, or which, having now been considered, warrant any modification of that order.

The Commission orders:

The motion for reconsideration filed herein by Dorchester on May 13, 1965, is hereby denied.

By the Commission.

(SEAL)

JOSEPH H. GUTRIDE,
Secretary.

APPENDIX C

Excerpts From Permian Basin Area Rate Decision

UNITED STATES OF AMERICA FEDERAL POWER COMMISSION

Before Commissioners: Joseph C. Swidler, Chairman; Lawrence J. O'Connor, Jr.; Charles R. Ross; David S. Black; and Carl E. Bagge.

Area Rate Proceeding	Docket No. AR61-1
Claude E. Aikman, *et al.*,	Docket Nos. G-18466, *et al.*
North Central Oil Corporation (Operator), *et al.*	Docket Nos. CI60-435, *et al.*

Opinion and Order Determining Just and Reasonable Rates for Natural Gas Producers in the Permian Basin

Issued: August 5, 1965

* * * * * * * * * * *

[Numbers refer to page of mimeographed edition]

* * * * * * * * * * *

114 MINIMUM RATES

The examiner found that certain contracts in the Permian Basin were "below the revenue standards" he adopted. While the record is not clear on this point many of these contracts presumably were negotiated at a time when natural gas was a by-product of the search for oil and the interstate markets had not yet developed.

To aid in rectifying the situations where producers had contractually precluded themselves from obtaining an increase in price of their gas, the Examiner authorized the seller, with the consent of his buyer, to increase his rates

up to the minimum established in the decision; to wit, 9 cents per Mcf of gas-well gas and 7 cents per Mcf for casinghead gas.

115 The Supreme Court in *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956),[48] recognized that this Commission possesses the power to authorize rate increases despite contractual limitations to the contrary. However, the Court was careful to point out that such an order required as a foundation more than the mere fact that, because of an improvident bargain, a utility was receiving less than a fair price for its product. The Court said (at p. 355): "In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."

It is thus clear that the test of whether rates should be increased is not one of private equities but of the public interest. It is also clear that the examples set forth by the Court are not, and were not intended to be, the only instances where public interest would justify an authorization to increase rates in contravention of a contract. In addition it should be noted that the *Sierra* case was decided in the context of an individual company rather than an area rate approach.

We concur with the examiner in his conclusion that the establishment of minimum rates in this case is in the public interest and that the price impact on the consumer will be *de minimis*. While on the one hand, the establishment of a maximum price for the area is essential so that the ultimate consumer does not pay a price which is excessive

---

[48] Though this case involved the Federal Power Act, the Court noted that: "The pertinent provisions of the Federal Power Act, * * * are §§ 205(c), (d), and (e), and 206(a), which are substantially identical to §§ 4(c), (d), and (e), and 5(a), respectively, of the Natural Gas Act." (at pp. 350-351)

in relation to group costs and other relevant consid-
116 erations, we believe that a minimum price also constitutes an integral part of the area rate approach. The rate received by a producer must not be so low as to prevent or retard further exploration and thereby decrease possible discovery of gas reserves which will be needed by consumers. The amount of additional revenue so provided, at the most $250,000 annually, will have no significant impact on consumers but the relief afforded the individual producers involved may be important to their continuation in the search for additional gas supplies needed to meet the growing needs of the consuming markets.

Although we have agreed with the examiner's conclusion as to the need for a minimum rate, we believe that his remedy, which would not allow the producer with subminimum rates to raise them to the minimum unless he secured the approval of his purchaser, is not sufficient. Renegotiation of contracts resulting in increased rates which do not exceed the area rate would be proper without any action by this Commission, so that the examiner's remedy would avail nothing.

We therefore deem it necessary and appropriate to establish a minimum rate in this area of 9 cents per Mcf for gas of standard pipeline quality, with adjustments from the minimum price to reflect any deviations from the quality standards established herein, and to hold that the minimum rate herein established may be filed without purchaser approval at any time after this order becomes final.

• • • • • • • • • • •

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	2
Argument	9
Conclusion	14

TABLE OF CITATIONS

Cases:

Area Rate Proceedings, Opinion Nos. 468 and 468–A, issued August 5 and October 4, 1965, petitions for review pending *sub nom. Skelly Oil Co., et al.* v. *Federal Power Commission*, C.A. 10, Nos. 8385, *et al*	4, 14
Federal Communications Commission v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265	11
Federal Power Commission v. *Arkansas Power & Light Co.*, 330 U.S. 802	13
Federal Power Commission v. *Metropolitan Edison Co.*, 304 U.S. 375	13
Federal Power Commission v. *Sierra Pacific Power Co.*, 350 U.S. 348	6, 10, 12, 13
Southeastern Public Service Co., 31 FPC 973	7
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332	10, 12, 13
Wisconsin v. *Federal Power Commission*, 373 U.S. 294	11, 13

211-500—66——1

Statutes:

Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821–833, as amended, 15 U.S.C. 717–717w:

	Page
Section 4(e), 15 U.S.C. 717c(e)	4
Section 5(a), 15 U.S.C. 717d(a)	4, 5, 9, 10

Miscellaneous:

Investment Dealers Digest (1965)	4
Moody's Industrial Manual (1962, 1963, 1964)	3

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1051

DORCHESTER GAS PRODUCING COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 15295 (Pet. App. 8a–9a) is reported at 353 F. 2d 162; the order of the Federal Power Commission is reported at 32 FPC 1339 (J. App. 39a–43a),[1] and the order denying reconsideration (J. App. 65a–68a) is reported at 33 FPC 88. The order of the court of appeals in No. 15518 (Pet. App. 10a–11a), is not yet reported; also, the order of the Federal Power Commission denying appeal (Pet. App. 12a–14a) and the order denying reconsideration (Pet. App. 15a) are not yet reported. The hearing examiner's ruling (J. App. 104a–105a) is not reported.

[1] J. App. refers to the Joint Appendix in No. 15295, nine copies of which were filed with the petition (Pet. App. 11a).

JURISDICTION

The opinion of the court of appeals in No. 15295 was filed on November 23, 1965 (Pet. App. 8a–9a), and its decree was entered on January 17, 1966 (Pet. App. 9a–10a). The order of the court of appeals in No. 15518 was entered on January 19, 1966 (Pet. App. 10a–11a). The petition for a writ of certiorari was filed on February 21, 1966. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission abused its discretion in declining to initiate an investigation of petitioner's rates, under Section 5(a) of the Natural Gas Act, when such rates were already the subject of inquiry in a pending area rate investigation.

2. Whether the court of appeals erred in dismissing as premature a petition to review an order of the Federal Power Commission denying petitioner's request for a ruling as to its right to introduce evidence of its cost of service in a pending area rate investigation.

STATUTE INVOLVED

The relevant statutory provisions are set forth in the appendix to the petition (Pet. App. 1a–7a).

STATEMENT

Petitioner, Dorchester Gas Producing Company, is a Delaware corporation engaged in the production, gathering and sale of natural gas in Texas, Oklahoma, Kansas, Mississippi and other States. It sells

approximately 28 million Mcf annually under seven rate schedules on file with the Federal Power Commission. Its most significant sales are to Northern Natural Gas Company and Natural Gas Pipeline Company of America, to each of which it sells approximately 12 million Mcf annually. The sales to Northern (under Rate Schedule No. 1) are at the rate of 17.598 cents per Mcf and are subject to refund in Docket No. G–18671, having been increased from 8 cents. The sales to Natural (under Rate Schedule No. 2) are at the rate of 7.1463, which is the maximum rate provided in Dorchester's long term contract with Natural and which Natural is unwilling to increase.

On May 20, 1964, Dorchester filed a petition (J. App. 13a–33a) requesting "the Commission to issue, on its own motion and pursuant to Section 5(a) of the Natural Gas Act, an order instituting an investigation" to determine the justness and reasonableness of all of petitioner's rates subject to the jurisdiction of the Commission. In support of its petition, Dorchester claimed that its revenues from its jurisdictional sales were appreciably less than its cost of service, that it was able to continue its operations only because of the forebearance of its creditors, and that, in particular, the rate it received on sales to Natural were so low as to affect adversely the public interest.[2]

[2] According to Moody's Industrial Manual, Dorchester's net profits for the years 1962, 1963 and 1964 were, respectively, $399,052 (53 cents per share), $565,105 (75 cents per share) and $679,199 (86 cents per share), and its current assets ex-

By order issued November 19, 1964 (J. App. 39a–43a, 32 FPC 1339), the Commission denied Dorchester's petition. The Commission pointed out (J. App. 40a) that all of petitioner's rates, with the exception of Rate Schedule No. 5, are the subject of area rate proceedings.[3] Rate Schedules Nos. 1, 2, 4, 6, and 7 (J. App. 19a–24a) are subject, either under Section 4(e) or Section 5(a) of the Natural Gas Act, to the Hugoton-Anadarko area rate proceeding, and the just and reasonable rate under Rate Schedule No. 3 was determined in the landmark Permian Basin area rate proceeding (J. App. 40a).[4] In a subsequent order, denying reconsideration, the Commission emphasized

---

ceeded its current liabilities in each of those years by, approximately $400,000, $1,500,000 and $2,500,000, respectively. In October 1964 it issued 63,110 shares of 5½ percent preferred stock in exchange for the net assets of Monarch Tile Mfg., Inc. Investment Dealers Digest, June 14, 1965, p. 43, reports Dorchester's earnings in the first quarter of 1965 as $272,000 or 36 cents per share as against $188,000 or 25 cents per share in the first quarter of 1964. These figures reflect the overall operations of the company, both jurisdictional and nonjurisdictional.

[3] Sales under Rate Schedule No. 5 are small (131,656 Mcf in 1963) (J. App. 22a–23a). Petitioner raises no issue here as to this sale.

[4] *Area Rate Proceeding*, Docket No. AR61–1, Opinion No. 468, issued August 5, 1965, and Opinion No. 468–A, issued October 4, 1965, pending on petitions for review in the Tenth Circuit *sub nom. Skelly Oil Co., et al.* v. *Federal Power Commission* (C.A. 10 No. 8385, *et al.*).

The Hugoton-Anadarko area rate proceeding is one of the four area rate proceedings that have been initiated by the Commission. The first, covering the Permian area, was decided August 5, 1965. In these four area proceedings the Commission will fix the just and reasonable rates for about 75 percent of the gas flowing in interstate commerce.

that Dorchester will receive full consideration of its claims to relief under Section 5(a) in the Hugoton-Anadarko area rate proceeding (J. App. 67a; 33 FPC 88–89).

While denying Dorchester's primary request, the Commission's November 19 order (J. App. 42a–43a) did provide relief to Dorchester with respect to funds tied up by the trust agreement covering its collection of rates potentially subject to refund at the conclusion of pending proceedings (Docket Nos. G–18671 and RI60–11). It indicated that, in lieu of the trust arrangement,[5] it would accept an agreement and undertaking from petitioner's mortgagees assuring the refund of any excess charges in those proceedings. In the alternative, it said it would permit petitioner to file an agreement and undertaking to assure the refund of any excess charges for those amounts collected in Docket No. G–18671 between 8 cents and 11 cents under its Rate Schedule No. 1.[6]

In an application for rehearing (J. App. 44a–65a), which the Commission treated as a motion for reconsideration (J. App. 65a–68a), Dorchester con-

[5] The Commission had originally required the trust fund as a method of insuring that Dorchester, despite its alleged financial difficulties, would be in a position to refund to its customers any sum due them if the just and reasonable rate should be found to be less than the 17.598 cents per Mcf which Dorchester was collecting (see J. App. 2a–6a).

[6] Some six months later, petitioner applied to the Commission for the release of $1,715,929.70 from the trust fund in accordance with the November 19 order. Petitioner's motion was granted by order issued June 16, 1965, in Docket No. G–18671 (not reported). Under that order petitioner will also be allowed to make use of an additional $360,000 annually in the future.

tended, *inter alia,* that in the area rate proceeding it could not receive the relief it needed from its allegedly low contract rate of 7.1463 cents per Mcf for sales to Natural. It also asserted that decision in the area rate proceeding will be long delayed thus denying it relief. The Commission in its order of January 19, 1965, denying reconsideration explained (J. App. 67a; 33 FPC 88–89):

> In arguing that it will not receive any relief in the area proceeding under Section 5(a) with respect to its sale to Natural, Dorchester assumes that we do not have the power in such a proceeding to grant any relief under Section 5(a) to which a party may be entitled. We are unwilling to make any such assumption. The very questions raised here by Dorchester as to action under the *Sierra* doctrine [*Federal Power Commission* v. *Sierra Power Co.,* 350 U.S. 348] to relieve producers of low fixed price contracts are involved in the Permian Basin area rate proceeding in Docket No. AR61–1, which is now pending before us on exceptions to the examiner's decision. Such questions will, no doubt, also be raised in the Hugoton-Anadarko proceeding. In the area proceeding Dorchester will receive full consideration of its claims to relief under Section 5(a). [Footnote omitted.]
>
> Dorchester suggests that decision in the area proceeding will not be reached for many years, while a final decision in the individual hearing requested by Dorchester could be made in a matter of six months. Aside from the question of the accuracy of Dorchester's prediction, we believe that the novel and intricate question of

> the circumstances, if any, in which producers should be permitted to seek rates higher than those permissible under their contracts with a pipeline lend themselves at least initially to an area proceeding where we can evaluate the effect of one such action upon other sales agreements in the area.

Subsequently, the Commission did determine the *Sierra* question in the *Permian* case, *supra*, and specifically granted producers with low contract rates special relief (see pp. 13–14, *infra*).

The Commission, in its January 19 order, also explained why it had set a number of producer-rate cases for individual hearing subsequent to the commencement of certain area rate proceedings (J. App. 68a). It pointed out that those cases involved situations where increases in other producer rates in the area would be triggered if the producer rates set for hearing were allowed to go into effect subject to refund. Since such triggering might involve millions of dollars in higher gas costs, the Commission, in those instances, took extraordinary action.[7]

Dorchester sought review of the Commission's order of November 19, 1964, in the Court of Appeals for the Third Circuit. On November 23, 1965, the court

[7] In the few triggering cases which have actually gone to hearing (most producers have chosen to reduce their filed rates to non-triggering levels instead of defending triggering rates in a separate hearing), the Commission has sought only to determine whether there was any support for the triggering increases. It has not sought to determine the just and reasonable rates under such contracts. *Southeastern Public Service Company*, 31 FPC 973, 975.

211-500—66—2

affirmed the Commission's order in a *per curiam* opinion (Pet. App. 8a–9a). It noted that

> * * * [i]n refusing petitioner an individualized investigation of its rates, [the Commission] determined that comprehensive investigation was preferable to "piece-meal" inquiry. It concluded that under the Act its primary function was to promote the paramount interest of the consuming public by establishing rate stability in this producing area.

The court held "that the Commission acted properly and within a permissive area of administrative conduct wherein it reasonably exercised its discretion upon substantial and sufficient basis in fact and law" (Pet. App. 9a).

Following the Commission's denial of Dorchester's request for a separate Commission investigation of its rates, Dorchester, on January 29, 1965, applied to the Presiding Examiner in the Hugoton-Anadarko area rate proceeding for a definitive ruling as to its right to present in that proceeding evidence relating to its individual company cost of service—evidence which allegedly would show that its contract rate with Natural, reflected in Rate Schedule No. 2, was too low (J. App. 97a–104a). The examiner denied Dorchester's request on March 9, 1965 (J. App. 104a–105a), and the Commission denied an appeal therefrom on April 13, 1965 (Pet. App. 12a–14a). In its order of April 13 the Commission said (Pet. App. 13a):

> * * * *Sierra* makes clear, however, that even in the context of individual company rate making for pipelines or public utilities the issue is

not whether the contractual limitations on rate filings will result in affording the company less than a fair return, but whether the rate "is so low as to adversely affect the public interest" (350 U.S. 348 at 355). Thus, without here determining what showing would be essential to "the protection of the public interest, as distinguished from the private interests" of Dorchester or other producers in context of an area rate proceeding it is clear that introduction of an individual company cost of service by Dorchester would not be of any greater relevance to a determination of the *Sierra* issue than to the fixing of the area rate itself.

To the extent that Dorchester is claiming that it is legally or equitably entitled to special relief over and beyond that to be afforded all other respondents who may have contractual inhibitions on filing rates up to the levels specified in our area rate determination, it is sufficient to add that Dorchester must await the fixing of the area rate or rates before it can properly present such a claim. * * *

Reconsideration was denied by order of June 7, 1965 (Pet. App. 15a). Dorchester's petition to review the order of April 13 in the court of appeals was dismissed on as premature January 19, 1966 (Pet. App. 10a–11a).

ARGUMENT

1. In these proceedings Dorchester has sought relief from the rate at which it has contracted to sell gas and which it now finds to be unprofitably low. To that end, Dorchester sought to invoke the Commission's power, under Section 5(a) of the Natural Gas

Act, to alter rates found to be unjust or unreasonable. Because Section 5(a) authorizes the Commission to proceed "upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company" but does not give explicit standing to gas producers, Dorchester could only furnish the Commission with relevant information and request that it initiate an investigation on its own motion. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 344–345. Moreover, "[i]n such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest"; the mere fact that a contract is unprofitable does not make it "unjust" or "unreasonable." *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 355. It is therefore evident that Dorchester's petition was an appeal to the Commission's discretion, and the question here presented is whether there was an abuse of discretion in the Commission's determination that the public interest would be better served by considering Dorchester's rates in the context of a comprehensive area investigation than by individualized or piecemeal inquiry. The court of appeals found that "the Commission acted properly and within a permissive area of administrative conduct wherein it reasonably exercised its discretion upon substantial and sufficient basis in fact and law" (Pet. App. 9a). That ruling does not call for further review by this Court.

Dorchester urges that it was entitled to have the Commission initiate a separate proceeding, based upon Dorchester's individual cost-of-service, to determine

whether the public interest requires relief from a low rate established by its sales contract, *i.e.*, that it should not be required to await completion of the area rate proceeding in which the same rate is in issue. But an agency has broad discretion to determine priorities in the handling of its workload, *Federal Communications Commission* v. *WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 282; specifically, this Court has sustained the authority of the Federal Power Commission to defer individual producer rate proceedings while it is engaged in the complex area proceedings, *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 313. Such authority seems particularly clear where the applicant's claim must be determined solely by reference to the public interest.

In reaching its determination, the Commission was clearly entitled to take into account, as it did, that even if a separate investigation of Dorchester's rates were initiated, any relief would have to await the completion of that investigation and any action taken "would be applicable only until such time as the Commission renders a decision" in the pending area case (J. App. 42a). Both of these considerations tended to indicate that relatively little was to be gained by the detour Dorchester urges. Moreover, since the Commission had already determined (see *Wisconsin* v. *Federal Power Commission*, 373 U.S. at 302) that the "'interest of consumers and the exigencies of regulation will be better served in rate proceedings brought on an area basis rather than on an individual company basis,' and that the area method would lead to 'more effective and expeditious regulation of the producer

sales'", it could properly decline to be side-tracked by an application for an individualized investigation. Surely, in these circumstances it cannot be said that the Commission abused its discretion "in deciding how best to allocate its resources" (*id.* at 313–314).

2. Petitioner claims that this case presents substantial questions as to the scope of *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, and *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348. But the decisions of the court below make no reference to those cases or to the issues petitioner seeks to raise. The short of it is that neither the Commission nor the court of appeals has purported to decide anything with respect to petitioner's ultimate right to relief under *Mobile* or *Sierra*.

All that the Commission has decided is that (1) it will not exercise its discretion to initiate a separate proceeding under Section 5(a) to determine petitioner's just and reasonable rates when the just and reasonable rates for its principal sales are already in issue in a pending area case; and (2) that, although it will permit petitioner to contend in the area proceeding that rates limited by contract to low prices should be raised (as it has in fact decided in the *Permian* case [9]), it will not permit the introduction of individual company cost-of-service presentations at least until the basic determinations for the area as a whole have been made. All that the court of appeals held was (1) that the Commission acted within the

[9] See the excerpts from the opinion of the Commission in the Permian area case (Docket AR61–1) set forth in the Appendix hereto.

permissible area of administrative discretion when it refused to initiate an individual rate case for petitioner that would overlap the area proceeding in which its major sales were already under consideration (Pet. App. 8a–9a) (see *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 313–314), and (2) that it was premature for a court to pass upon the exclusion of a particular type of evidence while the administrative proceeding is still pending before the Commission (Pet. App. 10a–11a).[9] Neither of these holdings can be thought to raise questions warranting plenary consideration by this Court.

Nor does the petition present any question of importance to the administration of the Natural Gas Act. Throughout the decade since the Court's decisions in *Mobile* and *Sierra* not a single electric utility or natural gas pipeline has sought to have the Commission initiate proceedings to authorize it to charge more than its contractually authorized rates. Nor has any independent producer, other than Dorchester, invoked *Mobile* and *Sierra* outside the context of an area rate proceeding. This is not to say that the Commission has overlooked the problem faced by producers with low contractually fixed rates. As petitioner itself points out, in the *Permian Basin* case (the first area decision) the Commission invoked *Sierra* to establish a 9 cent floor—finding that rates below that figure would tend to impair gas exploration and development to the detriment of the public interest

[9] See *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U.S. 375, 383–385; *cf.*, *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802.

(Pet. App. 16a–18a). Moreover, in that same decision, the Commission established a procedure whereby individual producers who can demonstrate that the area rate is confiscatory as applied to them or who can otherwise demonstrate that they are entitled to special treatment, can secure appropriate relief. *Area Rate Proceeding* (Opinion No. 468, Docket Nos. AR61–1, *et al.*, issued August 5, 1965). The relevant portions are reproduced in the Appendix, *infra* pp. 15–21.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

RICHARD A. SOLOMON,
General Counsel,

HOWARD E. WAHRENBROCK,
Solicitor,

LEO E. FORQUER,
Assistant General Counsel,

FRANCIS J. GILMORE,
Attorney,
Federal Power Commission.

MARCH 1966.

APPENDIX

FEDERAL POWER COMMISSION

Opinion and Order Determining Just and Reasonable Rates for Natural Gas Producers in the Permian Basin

Docket Nos. AR61–1 *et al.* (Opinion No. 468, August 5, 1965)

* * * * *

PETITIONS FOR SPECIAL EXEMPTION FROM THE AREA RATES

We have already discussed *supra* at pages 11–19 why we believe that maximum area rates can and should be established as the just and reasonable rates applicable generally to the sales of natural gas in the Permian Basin. The question remains what procedure or procedures should be adopted for the benefit of those respondents who, by reason of special circumstances, believe they can demonstrate that they are entitled to variant treatment.

First, we should frame the limits of the problem. We are not here treating sales to be permanently certificated after the effective date of this decision. In the future it would normally not be in the public interest to certificate sales of gas (including gas flowing under temporary certificates) at initial prices above the applicable area rate. While we do not visualize any reason for certifying any new sales at prices above the just and reasonable ceiling price, any producer unwilling to accept a certificate at the appropriate ceiling will have an opportunity to show in the hearing on his certificate application the spe-

cial circumstances which he believes warrant making an exception in his case in the public interest.

The problem for our immediate attention thus relates solely to gas presently being sold under outstanding certificates. Our decision herein has a double impact on the gas presently flowing in interstate commerce from producers in the Permian Basin. It fixes a price for the future, and it determines the basis for refunds for past periods. We shall first discuss the basis for permitting special exceptions to the area rate with respect to future rates for flowing gas and later discuss the question of relief from refund requirements.

It would seem clear that where a producer who has contracted for an above-ceiling price can show that his out-of-pocket expenses in connection with the operation of a particular well are greater than the revenues under the applicable area price, he should be entitled to appropriate relief, and there may be other circumstances where a producer as a matter of law or in the public interest would be entitled to some relief.

We need not and cannot here specify all of the special circumstances which may serve as a basis for exceptions to the area rate. It is clear however that confiscation does not result merely because, as a result of high costs or low production, a given producer cannot, at the area price, recover his expenses for his unsuccessful exploration and development costs and earn the 12 percent overall return on producer investment rate base which we have adopted as the appropriate return to attract capital on an area-wide basis for gas exploration and development. We recognize that any amounts received by the producer for flowing gas above out-of-pocket expenses would be available to finance further exploration, but no producer

has a constitutional right to a price for the future which will enable him to expand his venture in the interstate gas business and the inability to earn such allowances at the area ceiling cannot be characterized as confiscation. As the Court of Appeals for the District of Columbia recently observed, "the Commission is not required to subsidize high cost producers with consumers' money." *Atlantic Refining Co.* v. *F.P.C.*, 316 F. 2d 677, 680 (CADC, 1963); see also *Callery Properties, Inc. et al.* v. *F.P.C.*, 335 F. 2d 1004 (CA5, 1964). The same rule certainly applies to the development of reserves which are held off the market for speculative purposes.

Even in situations where producers are able to show that they are entitled to relief from the obligation to continue to sell flowing gas at the appropriate area ceiling, in most cases it may be sufficient to permit them to abandon their unprofitable sales. Unlike the case of some public utilities which cannot abandon service without harming the public dependent thereon, we will seldom have a situation in which a particular producer's abandonment of some or all of its sales in the area will significantly affect the purchasing pipeline, to say nothing of the ultimate gas consumer. There may, however, be some exceptional situations where abandonment could be shown to be detrimental to consumers, or where the producer could demonstrate that some other form of relief would best serve the interests of the public as well as his own.

The remaining confiscation question is with respect to refunds for past periods. On a composite basis the area ceiling prices for both flowing and new gas provide a reasonable allowance for exploration and development and production operating expenses in addition to a 12 percent return on the producing investment. As we stated earlier, a claim that it would

be confiscatory to require the refund of amounts a producer has collected above the area rate cannot be supported by the fact that a particular producer in the past has chosen to spend more than a reasonable allowance in what proves to be unsuccessful or marginal exploratory efforts or by the fact that unit production costs are high because for speculative purposes or other reasons the producer has withheld from production gas that he has discovered. On the other hand it seems clear that a producer should not be required to make refunds for past periods which would deprive him of amounts sufficient to cover his out-of-pocket operating expenses in the Permian Basin for such period. We need not consider other situations at this stage of the proceeding; it is sufficient to note that here too we will entertain petitions for special relief, and that the dockets involved will remain subject to the existing interest obligations pending their resolution.

We need not speculate further here as to the exact circumstances in which special relief may be warranted from the area price maximums for some or all of a producer's sales, or the appropriate nature of such relief. Any producer claiming that he is entitled to special relief from the maximum rate set for any of his Permian sales or from the refund obligations imposed herein may file a petition for such relief with the Commission consistent with the general guidelines set forth herein. Any such petition will be disposed of as promptly as possible. Since the petitioner will bear the burden of showing that he is entitled to special relief the producer (unless authorization is granted for temporary abandonment) will not be relieved of his obligation to continue service at the appropriate just and reasonable rate pending the

determination of his petition. See *The New England Divisions* case, 261 U.S. 184, 198–199 (1923).

* * * * *

MINIMUM RATES

The examiner found that certain contracts in the Permian Basin were "below the revenue standards" he adopted. While the record is not clear on this point many of these contracts presumably were negotiated at a time when natural gas was a by-product of the search for oil and the interstate markets had not yet developed.

To aid in rectifying the situations where producers had contractually precluded themselves from obtaining an increase in price of their gas, the examiner authorized the seller, with the consent of his buyer, to increase his rates up to the minimum established in the decision; to wit, 9 cents per Mcf of gas-well gas and 7 cents per Mcf for casinghead gas.

The Supreme Court in *F.P.C.* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956),[48] recognized that this Commission possesses the power to authorize rate increases despite contractual limitations to the contrary. However, the Court was careful to point out that such an order required as a foundation more than the mere fact that, because of an improvident bargain, a utility was receiving less than a fair price for its product. The Court said (at p. 355): "In such circumstances the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair

[48] Though this case involved the Federal Power Act, the Court noted that: "The pertinent provisions of the Federal Power Act, * * * are §§ 205 (c), (d), and (e), and 206(a), which are substantially identical to §§ 4 (c), (d), and (e), and 5(a), respectively, of the Natural Gas Act." (at pp. 350–351).

the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory."

It is thus clear that the test of whether rates should be increased is not one of private equities but of the public interest. It is also clear that the examples set forth by the Court are not, and were not intended to be, the only instances where public interest would justify an authorization to increase rates in contravention of a contract. In addition it should be noted that the *Sierra* case was decided in the context of an individual company rather than an area rate approach.

We concur with the examiner in his conclusion that the establishment of minimum rates in this case is in the public interest and that the price impact on the consumer will be *de minimis*. While on the one hand, the establishment of a maximum price for the area is essential so that the ultimate consumer does not pay a price which is excessive in relation to group costs and other relevant considerations, we believe that a minimum price also constitutes an integral part of the area rate approach. The rate received by a producer must not be so low as to prevent or retard further exploration and thereby decrease possible discovery of gas reserves which will be needed by consumers. The amount of additional revenues so provided, at the most $250,000 annually, will have no significant impact on consumers but the relief afforded the individual producers involved may be important to their continuation in the search for additional gas supplies needed to meet the growing needs of the consuming markets.

Although we have agreed with the examiner's conclusion as to the need for a minimum rate, we believe that his remedy, which would not allow the producer

with sub-minimum rates to raise them to the minimum unless he secured the approval of his purchaser, is not sufficient. Renegotiation of contracts resulting in increased rates which do not exceed the area rate would be proper without any action by this Commission, so that the examiner's remedy would avail nothing.

We therefore deem it necessary and appropriate to establish a minimum rate in this area of 9 cents per Mcf for gas of standard pipeline quality, with adjustments from the minimum price to reflect any deviations from the quality standards established herein, and to hold that the minimum rate herein established may be filed without purchaser approval at any time after this order becomes final.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE:1966

Office-Supreme Court, U.S.
FILED
MAR 29 1966
JOHN F. DAVIS, CLERK

No. 1051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

DORCHESTER GAS PRODUCING COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

BERNARD A. FOSTER, JR.
DONALD B. ROBERTSON
Ross, Marsh & Foster
725 15th Street, N. W.
Washington, D. C. 20005
Attorneys for Dorchester Gas Producing Company

March 29, 1966

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

TABLE OF CONTENTS

Page

Table of Citations i

I. Relief Under *Sierra* and *Mobile* Need Not Conflict with the Area Rate Approach 2

II. Failure to Mention *Sierra* and *Mobile* Does Not Avoid Conflict Therewith 3

III. "Special-Exemption" Section of Commission's *Permian* Decision Suggests No Solution 4

IV. Conclusion 5

TABLE OF CITATIONS

CASES:

FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956) 2, 3, 4, 5

United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956) 2, 3, 4, 5

FEDERAL POWER COMMISSION OPINION:

Area Rate Proceeding, AR61-1, Opinion No. 468, 34 FPC —— (August 5, 1965), appeal pending (10th Cir. Nos. 8385, *et al.*) 4

STATUTE:

Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717-717w (1958)

Section 4 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1051

DORCHESTER GAS PRODUCING COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner files this reply to the brief in opposition filed herein on March 23, 1966, by the Federal Power Commission (Commission).

I

Relief Under Sierra and Mobile Need Not Conflict With the Area Rate Approach

The Commission suggests (Opp. Br. 7) that where it has held individual rate hearings to determine the public interest it has not departed from its experimental area approach to the fixing of producers' rates for the reason that "it has not sought to determine the just and reasonable rates" in those individual hearings —the implication being that to determine an individual just and reasonable rate would somehow upset its area rate approach. Petitioner rejects this suggestion, but does not argue the point here for the reason that, even assuming its validity, there is no necessary incompatibility between the Commission's area approach and the immediate relief sought by petitioner. Methods by which the Commission might honor *Sierra*[1] and *Mobile*[2] without determining the just and reasonable rate for petitioner's sale can readily be devised.

One illustration will suffice. On the basis of *Sierra,* the Commission could grant petitioner an opportunity to adduce evidence of its individual cost of service. On the record thus made—and while expressly refraining from a determination of the just and reasonable rate—the Commission could then test whether petitioner's interest coincides with the public interest by finding whether or not its 7.1463-cent rate produces adverse consequences of the sort set forth in *Sierra.* If the foregoing public-interest test were met, the Commission could then authorize petitioner to make a filing under

---

[1] FPC v. Sierra Pac. Power Co., 350 U.S. 348 (1956).

[2] United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332 (1956).

section 4 of the Act for a rate increase up to its cost of service, suspend that rate increase for one day, and consolidate the section 4 rate suspension docket with the area proceeding at Docket No. AR64-1. Petitioner thereby would be permitted, *pendente lite,* to collect an increased rate—subject to full refunds—and the question of the just and reasonable rate could then be postponed until issuance of the final area order, all without any possible detriment to the public or the Commission's area approach.

The Commission does not lack either the ingenuity or the flexibility to honor simultaneously the principles announced by this Court in *Sierra* and *Mobile* and the requirements of its own area approach in a manner such as that suggested above. Accordingly, there is no inherent conflict between the two goals.

II

Failure to Mention Sierra and Mobile Does Not Avoid Conflict Therewith

The Commission carefully suggests that neither the Commission nor the court below "has *purported* to decide anything with respect to petitioner's *ultimate* right to relief under *Mobile* or *Sierra,*" relying upon the fact that the decision of the court below made no reference to either *Mobile* or *Sierra* "or to the issues petitioner seeks to raise" (Opp. Br. 12) (emphasis supplied). Petitioner does not dissent from the statement that the court below made no reference to those cases and failed to discuss the issues involved. But that fact does not mean that the decisions below do not conflict with principles announced by this Court. On the contrary, the Commission's failure to discuss the *Sierra* relief sought by petitioner (as distin-

guished from other kinds of *Sierra* relief) supports petitioner's contention that the Commission failed to follow *Sierra* and *Mobile*. Similar support is provided by the failure of the court below to mention *Sierra* or *Mobile* or to recognize that more is involved than "whether there was substantial *evidence* before the Commission to support its findings and order" (Pet. App. 8a-9a) (emphasis supplied).

III

"Special-Exemption" Section of Commission's Permian Decision Suggests No Solution

Nor does the Commission's first area rate decision in *Permian*[3] lessen the effect of its refusal to follow *Sierra* and *Mobile*. The petition herein has already discussed (Pet. 15-16) the ineffectiveness of the *Permian* "minimum-rate" approach (Pet. App. 16a-18a) as respects the requirements of *Sierra* and *Mobile* in the context of this case. The Commission now asserts that the procedure established in *Permian* for a "special exemption" from the area rate there established is an example of how petitioner may ultimately obtain the *Sierra* relief it seeks (see *e.g.* Opp. Br. 14). But this "savings-clause" approach no more honors the requirements of *Sierra* and *Mobile* than does the "minimum-rate" approach. It simply provides that *after* an area rate has finally been established a producer "may file a petition" for special relief and that such petition "will be disposed of as promptly as possible" (Opp. App. 18). By its own terms, therefore, this "savings clause" only heightens the already acute delay problem discussed in the petition (see *e.g.* Pet. 16-17, n. 15),

---

[3] Area Rate Proceeding, AR61-1, Opinion No. 468, 34 FPC —— (August 5, 1965), *appeal pending* (10th Cir. Nos. 8385, *et al.*).

and it finally admits that even more delay is involved than ever has been claimed by petitioner. At the same time, it fails to give recognition to the principles of *Mobile* and *Sierra* which, by definition, require relief now if at all.

IV

Conclusion

For the foregoing reasons, as well as those set forth in the petition for a writ of certiorari herein, that petition should be granted.

Respectfully submitted,

BERNARD A. FOSTER, JR.
DONALD B. ROBERTSON
Ross, Marsh & Foster
725 15th Street, N.W.
Washington, D. C. 20005
Attorneys for Dorchester Gas Producing Company

Dated at Washington, D. C.
this 29th day of March, 1966